

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	Docket No. 13 CR 515
vs.)	
DMITRY FIRTASH and ANDRAS)	Chicago, Illinois
KNOPP,)	September 15, 2017
Defendants.)	10:48 p.m.

TRANSCRIPT OF PROCEEDINGS - Oral Argument
BEFORE THE HONORABLE REBECCA R. PALLMEYER

APPEARANCES:

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Court Reporter:

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1 THE CLERK: 13 CR 515, United States versus Firtash
2 and Knopp for continuing oral argument.

3 MR. BHACHU: Good morning, your Honor.

4 Amru Bhachu on behalf of the United States. Last
5 name is spelled B-h-a-c-h-u.

6 I believe we also have an individual from the fraud
7 section on a conference call with us -- joining us as well.

8 MR. WEBB: Your Honor --

9 MR. CESTARO (telephonically): Yes, your Honor.
10 This is Christopher Cestaro with the Department of Justice.

11 THE COURT: Good morning.

12 MR. WEBB: Your Honor, Dan Webb and Matt Carter on
13 behalf of Mr. Firtash.

14 MS. GURLAND: Good morning, your Honor.

15 Carolyn Gurland on behalf of Andras Knopp.

16 THE COURT: Okay.

17 MR. WEBB: Also on the phone, your Honor, in
18 connection with Mr. Firtash is Otto Dietrich, who was
19 physically here in the courtroom last Monday. He is back in
20 Austria, but he is just on the phone in case there's any
21 questions that come up about the Austrian extradition
22 proceeding.

23 THE COURT: All right. And I know that we put this
24 over for a little bit more time this morning. I thought that
25 perhaps the desire there was to address these issues about

1 what the likelihood is of Mr. Firtash's being removed from
2 Austria.

3 MR. WEBB: I was going to get into that issue. I
4 was going to just talk about the two issues -- ripeness and
5 venue -- that should respond to certain comments made by the
6 government during its argument.

7 In talking about ripeness, I was going to update
8 the Court on some developments in Austria.

9 THE COURT: Okay.

10 MR. WEBB: And then Ms. Gurland was going to
11 respond to some of the arguments made by the government on
12 Monday in their oral argument on the other three issues in
13 the brief.

14 That's what we were planning on doing, if that's
15 okay with your Honor.

16 THE COURT: That's fine. That's fine. As long as
17 we have -- I will need to break in 45 minutes, but that's
18 fine.

19 MR. WEBB: Break when? I didn't hear.

20 THE COURT: Forty-five minutes.

21 MR. WEBB: That's fine. We will try to be very
22 quick, your Honor.

23 MR. BHACHU: May I be seated, Judge?

24 THE COURT: Sure.

25 MR. BHACHU: Thank you.

1 MR. WEBB: Your Honor, at the outset, by the way,
2 let me just -- as far as the government's argument that we
3 are responding to about the motion to dismiss, I was a little
4 bit surprised that -- as your Honor knows, that, as far as
5 this motion to dismiss, that it has to be decided based on
6 Supreme Court authority in the Seventh Circuit, has to be
7 decided based on the allegations that appear on the face of
8 the indictment.

9 I'm not allowed to go beyond the face of the
10 indictment and talk about evidence at trial, nor is the
11 government allowed to do that, although frequently the
12 government did do that.

13 I counted on 13 occasions the government actually
14 went beyond what's in the indictment. I will just give you
15 one example, because venue is a big deal, and the government,
16 in talking about venue, told your Honor that one of the
17 codefendants, Andras Knopp, actually traveled to Chicago and
18 had a meeting with Company A in Chicago to further the mining
19 project.

20 So I showed you the indictment, your Honor, last
21 Monday, and I showed you the only three acts that are alleged
22 to have occurred in the Northern District of Illinois. There
23 is nothing in the indictment -- not a single word in the
24 indictment that Andras Knopp traveled to Chicago and had a
25 meeting in the Northern District of Illinois with Company A.

1 It's just not in the indictment. It can't be considered.

2 And, by the way, the government knows how to plead.

3 If they need to plead an act in furtherance of the
4 conspiracy, they know how to do that, and they didn't plead
5 it, because, I have to believe, they didn't think it was in
6 furtherance of the conspiracy. But it's not in the
7 indictment at all. It's not there.

8 Let me go to ripeness and try to be -- I will try
9 to get to the point.

10 Let me update you on Austria.

11 THE COURT: Okay.

12 MR. WEBB: As far as the status in Austria, the
13 significant update is that, after we left court last Monday,
14 we found out the Austrian prosecutor had filed an appeal in
15 connection with the decision by the Austrian trial court that
16 denied the Spanish request for extradition of Mr. Firtash.

17 I'm told by the Austrian extradition lawyers that,
18 while it's impossible to tell with certainty, it's expected
19 this appeal will likely be resolved somewhere between two to
20 four months from now.

21 Also the Austrian lawyers believed that in that two
22 to four months, it's likely that the Austrian Supreme Court
23 will at least rule on whether it will entertain this
24 extraordinary writ that was filed.

25 So the bottom line is that, while we can't predict

1 with great accuracy -- with complete accuracy, Mr. Firtash,
2 depending on the actions taken by the Austrian courts, could
3 very well be facing extradition within two to four months.

4 If the Austrian courts deny the Spanish appeal, and
5 if the Austrian Supreme Court does not take the extraordinary
6 writ, then under Austrian law, Mr. Firtash will be
7 immediately extradited by the Ministry of Justice in Vienna.

8 So the government argued that you should just wait
9 and not rule on this motion and wait for Mr. Firtash to be
10 extradited back to the United States.

11 They didn't cite any case at all in connection with
12 that. And they said that -- they made a statement to your
13 Honor, in fact, that, well, if you actually ruled and then
14 maybe you ruled against Mr. Firtash, he would jump on a plane
15 and illegally leave Vienna, Austria, and violate the terms of
16 his bond.

17 I just need to point out to your Honor, I respect
18 Mr. Bhachu a lot, and we have a good relationship, but that
19 was just uncalled for. There is no evidence, your Honor.
20 There is two different courts in Vienna, Austria, that, over
21 the last four years when he has been there waiting to get
22 this resolved one way or the other, that have said he has
23 complied with every single condition of his bond.

24 There was actually, your Honor, a two-year period
25 where a court, after a trial, had actually ruled and told

1 Mr. Firtash, this prosecution in the U.S. is politically
2 motivated because of Ukrainian politics and certain events
3 that occurred. He didn't try to flee and say, well, my gosh,
4 I'm being held here. I'm away from my business and my
5 family. He didn't. He stayed in Vienna, Austria, and has
6 never violated and done anything to violate any bond
7 whatsoever.

8 As far as harm that would be -- your Honor, right
9 now I am going to get to venue, which they have not pled
10 venue, which is a constitutional requirement.

11 If he were to ship back here in U.S. marshal
12 shackles, put into the MCC, argue about whether he gets bond
13 pending going to trial in this case, he can't run his
14 businesses.

15 While he is in Austria, at least because it's in
16 Europe, people can come in from the Ukraine. His businesses
17 are in the Ukraine. He is able to have meetings in Vienna
18 and run a business operation. He can't from the U.S.

19 So for him to be taken to the U.S. in a case where
20 there is no venue and we don't believe any jurisdiction, we
21 just don't think it's fair. There is not a single case that
22 says that you should just abstain.

23 And so I'm just respectfully asking your Honor to
24 rule in your due course. I mean, you rule on motions when
25 you want to, but I'm just respectfully saying, this case is

1 ripe for a decision.

2 They cite some cases, which I told you are these
3 dual-proceeding cases, which have no application here. And I
4 don't know of any case that would say you should not rule on
5 this motion -- not now, but whenever you find you want to
6 rule on it in the normal course, which, I guess, we are
7 hoping would be over the next two to four months, but that's
8 entirely up to your Honor.

9 THE COURT: Just so you know, two to four months is
10 not unreasonable for ruling on a motion, even one as very
11 substantial as this one.

12 I was unclear when we were together earlier in the
13 week whether you believed that Mr. Firtash's removal could be
14 imminent, by which I mean days.

15 I am not in a position to rule on this before
16 October 1st, for sure, and I don't think probably for several
17 weeks thereafter. But I don't think it's unreasonable to
18 think that I should rule in two to four months.

19 I'm not sure that the government is asking for a
20 stay so much as suggesting that there is no panic.

21 MR. WEBB: Well, anyway, I am not arguing at all --
22 two to four months is fine, and thank you. I will move on.
23 I am going to move to venue.

24 Your Honor, on venue -- the government argued on
25 venue for quite some time and talked about things that are

1 not in the indictment. But I showed you the actual
2 paragraphs in the indictment. There are three. And those
3 paragraphs do not set forth compliance with the Seventh
4 Circuit *Bohle* case, B-o-h-l-e, that's cited on Page 27 of the
5 government's brief, which has held very specifically that,
6 because venue is a constitutional issue, not a technical
7 issue, the government has to plead specific facts, which
8 then, if proven at trial, would establish venue.

9 In fact, your Honor, the *Bohle* case was a case in
10 which -- what happened in that case is that the appellate
11 court looked at the indictment and said, you know what? The
12 government did not actually plead facts, which, if proven at
13 trial, would establish venue. But yet the defendant did not
14 file a 12(b) motion challenging that, and therefore it's
15 waived.

16 So there is no question that we have raised it here
17 and that, when you read over the paragraphs in the indictment
18 that I called to your Honor's attention last Monday, they set
19 forth conduct.

20 Two of the paragraphs deal with a man named Lal
21 that says he traveled from Chicago to North Carolina, and
22 then they plead overt acts in North Carolina. They don't
23 plead a single act that occurred in furtherance of the
24 conspiracy here in the Northern District of Illinois.

25 And then they plead in Paragraph H that I showed

1 you that there were telephones used somewhere in the U.S. to
2 carry out the conspiracy. They don't plead any telephones
3 used in the Northern District of Illinois. They say there is
4 a phone located here in the Northern District of Illinois.
5 And then they don't even plead any facts.

6 I mean, what *Bohle* says is that, for example, it
7 would be proper for the government to say that, on a certain
8 time period, Mr. Lal, while he is in the Northern District of
9 Illinois, placed a phone call and talked about bribery or
10 whatever. That would be an act in the Northern District of
11 Illinois or a meeting in the Northern District of Illinois.

12 But they have to -- they can't just say that --
13 anyway, they have to plead facts. And then you have to
14 decide, would those facts, if proven at trial, establish
15 venue? And they don't satisfy that requirement at all. I
16 explained to your Honor before that that's because there
17 really are no acts in the Northern District of Illinois
18 because of the nature of this case.

19 So in any event, they have not pled it anywhere in
20 the indictment. Those three paragraphs do not plead it at
21 all.

22 And as far as -- so the Seventh Circuit and the
23 U.S. Supreme Court, everyone agrees. If the cause of
24 action -- the crime is a conspiracy, if it is, you have to
25 plead an act in furtherance in this district. You have to

1 plead it.

2 Now, Mr. Bhachu says, well, that act does not need
3 to be illegal. And I agree with that. I'm not arguing about
4 that. They just have to plead facts, like a meeting or a
5 telephone call or an action that Lal or somebody did in the
6 Northern District of Illinois that you could say, if you
7 prove that at trial, that appears to me to be in furtherance
8 of the conspiracy.

9 So there is no other way to get venue at all under
10 the case law. You have to plead the act that actually -- and
11 you just can't plead it in a conclusory way. You can't say,
12 well, they promoted the bribery scheme in Illinois. They
13 can't say that. They have got to give you facts that
14 actually -- and, by the way, it's interesting. In those two
15 paragraphs that plead that Lal traveled to North Carolina and
16 then engaged in overt acts, they describe the acts.

17 They describe Lal getting on phone calls or having
18 meetings to plan out the bribery scheme. So they know how to
19 plead facts that show an act in furtherance of the
20 conspiracy. They just don't plead any that occurred in the
21 Northern District of Illinois.

22 Now, Mr. Bhachu then made another argument, well,
23 there could be an effect in the Northern District of
24 Illinois. There could be an effect -- not an act, but an
25 effect -- on commerce.

1 I would point out to your Honor that that's
2 actually not the law.

3 There are certain types of crimes where it's an
4 essential element of the crime that something has to occur.
5 Like the Hobbs Act, there has to be harm to commerce. So
6 they said, well, if the harm to commerce occurred in the
7 Northern District of Illinois, then that would be -- you
8 could do that by pleading that, or if the perjury occurred in
9 Illinois.

10 But that's not true with conspiracy law. The
11 conspiracy says the act itself has to actually be in the
12 Northern District of Illinois.

13 And although that's what the law is on conspiracy,
14 which is the crimes -- there is three conspiracies charged
15 here.

16 I might also point out, they didn't actually plead
17 an effect in the Northern District of Illinois. If your
18 Honor remembers, the indictment makes an allegation that a
19 company called Company A entered into an agreement that it
20 was going to be -- an agreement about an India mining
21 project. And they agreed that in the future they would work
22 toward entering a supply agreement, in which they would then
23 purchase titanium sponge, if any of it ever got manufactured.

24 They didn't plead that there was a supply
25 agreement. They didn't plead that there was a mining

1 operation, because it didn't happen. There never was a
2 supply agreement. There never was a mining operation that
3 ever could sell sponge.

4 So they haven't tried to plead that Company A, in
5 the Northern District of Illinois, what price would they have
6 paid? Would they have been overcharged because of the
7 bribery scheme? Would they have been deprived of profits?

8 They just don't -- in fact, they don't even plead
9 that the titanium was ever going to enter the U.S.

10 Company A, your Honor, is an international, large
11 company, and there is no reason to believe that this titanium
12 was ever even destined to the United States. Those are the
13 kind of details that would be negotiated with a supply
14 agreement, which never happened.

15 So they don't even plead an effect in the Northern
16 District of Illinois on Company A, even though, if they did
17 plead an effect, under the case law, that's -- the effect is
18 not an act in furtherance, and therefore is not, in fact,
19 venue in the Northern District of Illinois.

20 I have talked on long enough. I am going to turn
21 it over to Ms. -- unless you have any questions about venue,
22 your Honor.

23 THE COURT: No. I am sure Mr. Bhachu will respond,
24 but I will hear from Ms. Gurland.

25 MR. WEBB: Thank you very much.

1 MS. GURLAND: Good morning, your Honor.

2 THE COURT: Good morning.

3 MS. GURLAND: The government's focus on Monday was
4 the policy behind RICO, congressional statements about RICO
5 and money laundering, and international treaty obligations of
6 the U.S. in two separate international treaties, and concerns
7 about organized crime.

8 But, your Honor, in order for this Court to make a
9 decision, a legal decision, on this motion to dismiss, the
10 issue before the Court is whether or not it's an
11 impermissible exercise of extraterritorial jurisdiction.

12 And none of the things that the government -- none
13 of these things that the government talked about, these
14 concepts, are particularly helpful for that analysis.

15 What is required for this Court is to analyze the
16 extraterritorial application of RICO, of money laundering, of
17 the Travel Act, and to make determinations regarding whether
18 charging a conspiracy under FCPA would be enough to broaden
19 the categories of persons to whom that statute is to apply
20 and, relatedly, due process.

21 The analysis isn't simple. It goes through a
22 number of steps, and I went through them on Monday. I am not
23 going to repeat them.

24 Further complicating this analysis is that in 2016,
25 in *RJR Nabisco*, the Supreme Court, as we talked about, sort

1 of changed the rules of the game, changed the analysis, and
2 now there are certain precedential cases, but the precedent
3 is new, the law is new, and it's difficult. It's not
4 impossible, but it requires a level of analysis to get
5 through this.

6 What's critical for this Court to understand, I
7 think, your Honor, is that the government is asking you to
8 extend the principles of extraterritorial jurisdiction beyond
9 any of the cases that the defense cited in our brief and
10 beyond any of the cases that the government cited in their
11 brief.

12 And they are asking you to extend extraterritorial
13 jurisdiction beyond any of the Supreme Court cases on the
14 top, beyond *RJR* and beyond any of the cases analyzing *RJR*.

15 While the government is asking the Court to take
16 this rather extraordinary step in this area of law, it
17 doesn't even do that by citing for your Honor the cases that
18 your Honor would have to analyze in order to come to a
19 conclusion like that.

20 Instead it asks your Honor to do this based on the
21 sensationalist notion that the defendants are upper-echelon
22 organized crime figures or that somehow their entirely
23 legitimate operation to mine ilmenite is some sort of
24 transnational criminal enterprise.

25 This is false. These allegations are false. They

1 weren't included in the indictment, because the government
2 can't prove them.

3 And also, as Mr. Webb just described to you, if the
4 government didn't plead these types of allegations, then the
5 Court shouldn't be considering these types of allegations.
6 And the Court certainly shouldn't be considering these types
7 of allegations in lieu of the detailed analysis under *RJR*
8 *Nabisco* and related cases that would be required in order for
9 such an extreme extension of extraterritorial jurisdiction.

10 So what the defense is asking your Honor, quite
11 simply, is for the Court to ignore the distractions. Ignore
12 the distractions from the government about organized crime,
13 transnational this and that, RICO, RICO enterprise, ignore
14 all of that, and just apply *RJR Nabisco* and related cases,
15 because, your Honor, under the law, this indictment -- as
16 pled, this indictment is an improper exercise of -- is asking
17 the Court to improperly exercise jurisdiction.

18 A critical point for the Court to understand
19 related to that -- and this gets back to something that
20 Mr. Webb just talked about, because he and I both have -- we
21 have overlap, because there is an effects test in venue and
22 there is an effects test under RICO.

23 But something that I think is very important for
24 the Court to understand is that ilmenite -- ilmenite
25 mining -- it starts off with ilmenite mining. From ilmenite

1 mining you make slag. I don't know exactly what this looks
2 like, slag, but you make ilmenite slag.

3 From there, there are two separate chains of
4 production.

5 One is that you make titanium sponge. And,
6 incidentally, your Honor, you are right that it's called
7 titanium sponge for a reason. It's called sponge because it
8 actually physically looks like sponge, but it's not pliable
9 like sponge is. It's hard and it's metal. But it
10 actually -- to look at titanium sponge, it resembles sponge.

11 What they do with it from there is that they melt
12 it down in these high-powered furnaces, and they make, like,
13 plates or wires or other things like this. It's helpful for
14 certain industries, because it's light and it's durable.

15 A separate chain of production that comes from
16 ilmenite and ilmenite slag is titanium dioxide. Titanium
17 dioxide is a completely separate chain of production.
18 Titanium dioxide is the white that maybe makes the white in
19 the paper in front of me. It's in plastics and cosmetics and
20 automotive paints and things like this. They started using
21 it because it's not as toxic as lead is. So titanium dioxide
22 is a whole nother type of production.

23 In addition -- I mean, there is not just one sort
24 of purchaser of -- so there wouldn't be just one purchaser of
25 products coming from ilmenite. And there is not even just

1 one purchaser of titanium sponge. You can sell titanium
2 sponge to lots of people.

3 One of the reasons it's important -- and I am not
4 trying to go beyond the indictment, because, Mr. Webb is
5 exactly right, that under the law, we are with the four
6 corners of the indictment, and we are not supposed to go
7 beyond that. And I agree with that.

8 But I would direct your Honor to Page 3 of the
9 indictment at Paragraph E. And this is what Mr. Webb has
10 already talked about, that the indictment, all that it says
11 is that Company A was going to -- it gave the date of it, and
12 it says there is a memorandum of understanding and that they
13 agreed that they would work toward a supply agreement.

14 But Mr. Webb is exactly right that there wasn't a
15 supply agreement. There is not a supply agreement that's
16 pled in the indictment.

17 Now, one of the reasons why this is so important is
18 that, if the government were right that this Company A, that
19 this whole issue about titanium sales -- if this were so
20 critical that none of this would have happened, none of this
21 whole alleged bribery scheme would have happened but for this
22 Company A, but for these two meetings that evidently happened
23 in Seattle, that it's just that critical, wouldn't there
24 needed to have been a supply agreement?

25 I mean, Company A had no obligation to do anything.

1 As stated in the indictment at Page 3, Paragraph E, all it
2 says is, they are going to work toward something. I mean,
3 nobody has obligated themselves to do a single thing.

4 So I think we know just based on what's pled and
5 what's not pled in the indictment that it can't be the case
6 that it was so absolutely critical and necessary that
7 Company A should be involved in this. Company A had no legal
8 obligations to buy anything whatsoever.

9 And then I want to go, your Honor, just briefly
10 through a couple of the points that the government made on
11 each of the respective issues. I want to start with RICO.

12 One point that the government made about
13 extraterritoriality and the analysis of the *RJR Nabisco* case
14 is, well, you know, *RJR Nabisco* was a civil case, and so
15 maybe civil cases are a little bit different than criminal
16 and maybe we can't really get that much guidance from *RJR*
17 *Nabisco*.

18 But, your Honor, in *RJR Nabisco* the Supreme Court
19 was analyzing specifically criminal RICO allegations, 18 USC,
20 Section 1962(a) and (b) and (c) and (d).

21 This point is driven home by the fact that in a
22 separate part of the *RJR Nabisco* opinion, the court analyzes
23 RICO 1964(c), which is the civil part of RICO. And on that
24 point, *RJR Nabisco* actually comes to a completely different
25 conclusion than they do for the criminal point.

1 So it's not accurate to say, as the government
2 does, that it would be a reason that we could ignore or not
3 take as seriously the *RJR Nabisco* case, because it's exactly
4 on point. It's exactly on point for a RICO conspiracy, as is
5 charged in the indictment.

6 The other point that the government made about the
7 RICO conspiracy is that there was no effect on U.S.
8 commerce -- I mean, there was an effect on U.S. commerce,
9 because there was going to necessarily be 12 million pounds
10 of contraband introduced into the U.S. market.

11 But, your Honor, as we have already talked about,
12 there is no agreement that Company A is going to buy
13 anything. There is certainly not an agreement that they have
14 already determined that they are going to buy \$12 million of
15 titanium.

16 And as Mr. Webb already pointed out, even if the
17 government had pled that, which they didn't, because there is
18 no supply agreement alleged at Page 3, Paragraph E of the
19 indictment, but even if there were, there is absolutely
20 nothing pled in the indictment that would give any indication
21 that that titanium sponge was ever going to be distributed
22 within the United States.

23 I want to go now to money laundering.

24 As best as I could understand the government's
25 allegations about money laundering is that there is

1 jurisdiction over money laundering because they pled money
2 laundering as is required under the money laundering statute.
3 But that's just not proper, your Honor, under *RJR Nabisco*.

4 Under *RJR Nabisco*, the analysis is, first, is money
5 laundering a statute that can apply extraterritorially? As
6 we have seen the Supreme Court case, *RJR Nabisco* said, yes.
7 We are going to assume that, yes, that's true.

8 But from there you have to look to the focus of the
9 statute, and you have to look to 1956(f), which is the
10 jurisdictional component of the money laundering statute. I
11 feel like the government is resistant to that result, but
12 that's the result under *RJR Nabisco*, and it's the black
13 letter law of *RJR Nabisco* and of *Bank Julius*, which is a case
14 cited by the government.

15 You have to look to 1956(f). That tells you that
16 there can be jurisdiction if the conduct occurred in part in
17 the United States.

18 And then going to *Bank Julius*, the case that the
19 government cited for the proposition that there should be
20 jurisdiction under the money laundering statute, *Bank Julius*
21 says, well, if there was only a correspondent banking
22 relationship, if that's all there were, if there weren't
23 U.S. bank accounts also, and you were only restricted to just
24 U.S. correspondent banks, that's not enough.

25 Should I pause?

1 THE COURT: Go ahead.

2 MS. GURLAND: And the government refers also to the
3 *Prevezon* case and *Bank Julius*. And it bears remarking, your
4 Honor, that both of those cases were civil forfeiture cases,
5 and the bank -- and the *Prevezon* case specifically concerned
6 transportation of stolen property.

7 So when you are looking at those statutes that are
8 specifically about money and transfers of money and whether
9 or not the transfers of money are proper, there is a very
10 different analysis going on than in a money laundering
11 conspiracy case, particularly when the focus of that money
12 laundering conspiracy is allegations of bribery done by
13 Indian officials in India in connection with an Indian
14 project.

15 So the cases, in terms of the statutes under which
16 they are analyzed, are distinct. But even under the *Bank*
17 *Julius* case, what the government has pled in this indictment
18 is not enough.

19 Going to the Travel Act, your Honor, in the
20 government's discussions of the Travel Act, they are even
21 further afield from the *RJR* analysis that the Supreme Court
22 has directed applies to this case.

23 In the Travel Act, they don't even acknowledge that
24 the law of *RJR* is that when you find a case that doesn't, on
25 its face, have extraterritorial jurisdiction, then you have

1 to look to the focus of the statute. They don't even
2 acknowledge that that's the law that your Honor has to apply
3 in analyzing this case.

4 Well, the focus of the Travel Act count is not just
5 travel for travel's sake. It's travel to commit an illegal
6 act. The illegal act is alleged to be a money laundering
7 conspiracy, which, of course, takes us back to all of these
8 actions that are alleged to have unfolded in connection with
9 a plan to bribe Indian officials in India in connection with
10 an Indian project so that the focus is India.

11 And interestingly, your Honor, and importantly,
12 under the clear language of *RJR*, it doesn't matter if some
13 things happened in the United States. There can be things.
14 There can be a meeting with Gevorgyan in Seattle, and there
15 can be the fact that Lal evidently was in Chicago. The
16 indictment doesn't say what he did in Chicago. It doesn't
17 say he did anything, but he can be in Chicago, and Gevorgyan
18 can be in Seattle. The key inquiry is not whether or not
19 there is anything about anybody being in the United States.

20 The inquiry is, what is the focus? What is the
21 focus of the Travel Act statute?

22 And here, under what is pled, what is the focus of
23 the Travel Act statute in this indictment? The focus is
24 traveling in order to engage in international money
25 laundering, which takes us right back to the scheme in India.

1 And, your Honor, the focus of this Travel Act count
2 is the bribery scheme in India. It's not these incidental
3 things that they can say happened in the United States
4 without giving any detail.

5 The government also makes the suggestion that we
6 should simply just wait until trial to figure out
7 jurisdiction.

8 Your Honor, that's not what the cases do. The
9 cases understand -- *RJR Nabisco*, *Bank Julius*, this *Hawit* case
10 out of New York, *Prevezon*, these cases make the
11 jurisdictional determinations prior to going through a whole
12 trial, and they do it based on the facts that are in the
13 indictment. They don't wait for the end of the whole
14 proceeding to figure out whether or not there is
15 jurisdiction. These are cases that are making the rulings
16 based on a motion to dismiss an indictment. That's how these
17 cases arise. They don't arise after trial, and we don't have
18 to wait.

19 And it makes sense because, why would there be a
20 necessity of devoting all of the time and resources that it
21 would take in having defendants brought to this courtroom
22 improperly if they shouldn't be here?

23 And FCPA. The government discussion centers on one
24 just enormous myth, which is that the defendants' view of the
25 FCPA conspiracy is somehow that these defendants are just too

1 high-level. We are just too high-level to be prosecuted
2 under FCPA, and that's what we are saying. So if we were
3 low-level, it would be fine, but it's because we are
4 high-level. It's just got nothing to do with what our
5 arguments are.

6 What the argument that the defense has made in the
7 briefs and made on Monday is that the FCPA statute itself
8 outlines three different categories of parties that are
9 subject to prosecution under the FCPA.

10 People who are foreigners, who don't act in the
11 United States, that's not one of the categories. Just like
12 the foreign officials who might receive a bribe, they are not
13 in one of the categories.

14 So the question, what the court in *Hoskins* -- and
15 it's really on all fours with this. It's not to say that
16 your Honor has to apply *Hoskins*, because it is a Connecticut
17 case. But if your Honor read through what the *Hoskins* court
18 is saying, it goes through in great detail the legislative
19 history of the Foreign Corrupt Practices Act and all the
20 policy reasons why, under the reasoning that that court
21 applied, that you should not allow the government to extend
22 the parties to whom FCPA can apply by charging a conspiracy.
23 That's the reasoning of the *Castle* case, except in that
24 context, it's the foreign official who the court finds should
25 be excluded.

1 Understood in the context of the FCPA, that
2 actually makes sense, because although there could be a
3 reason that the United States might like to prosecute a
4 foreign official who takes a bribe or might like to prosecute
5 a foreigner who never acts in the United States in connection
6 with a corrupt payment, Congress made a decision that, while
7 we might like to do that, we have this issue of the
8 presumption against extraterritorial application of U.S. law.

9 So while we might like to do that, Congress engaged
10 in a balancing act and carefully chose not to cover these
11 parties. So it's the reasoning of *Hoskins* and of *Castle* that
12 the executive branch ought not broaden the categories of
13 parties that Congress chose to include in the statute by
14 charging a conspiracy. That's what's at issue.

15 The *Pino-Perez* case that the government discussed,
16 I mean, I don't think it's to the contrary. It doesn't
17 happen to be a case that analyzed anything under FCPA, so
18 it's not directly on point. But I don't think it's to the
19 contrary.

20 Three points.

21 Obviously, one, kingpin statute is very different
22 from FCPA, and the concerns that govern the kingpin statute
23 are separate. When your Honor reads *Pino-Perez* in connection
24 with these proceedings, you will see that the concern there
25 was, if you are charging someone with something under, like,

1 enhancing their penalties, should you have rather done that
2 as a separate count? Should it be under the sentencing
3 guidelines? There is a whole nother inquiry in this *Amen*
4 case and the *Pino-Perez* case we are getting into that really
5 don't have a lot of applicability to the things your Honor is
6 deciding in this case.

7 Second, listening to what the government
8 prosecutors' argument was about FCPA, it's not entirely clear
9 to me that, even under the formulation from *Pino-Perez*, that
10 these defendants wouldn't be necessary parties, because they
11 are saying, well, somebody who receives a bribe is a
12 necessary party. But, of course, without the defendants,
13 there wouldn't be anybody that would have been alleged to
14 have paid it.

15 So I think even under this analysis of *Pino-Perez*,
16 it still wouldn't -- it wouldn't change the analysis that
17 they shouldn't be able to be prosecuted.

18 And lastly, *Pino-Perez*. The holding is actually
19 that if a crime necessarily involves one or more others, then
20 the legislature didn't mean to involve the others. But I
21 think that applies to the formulation that we have stated,
22 because domestic -- U.S. citizens who act abroad and foreign
23 officials are not covered as parties, and so under this
24 analysis, they wouldn't be subject to FCPA.

25 This conclusion is buttressed by the legal

1 principles from these Supreme Court cases on not extending
2 extraterritorial application of U.S. law, that if a statute
3 is given some -- just some, and it's outlined -- some
4 extraterritorial application, that when courts interpret the
5 scope of that extraterritorial application, they should
6 restrict the statute to its scope.

7 I think that makes sense, and it also -- it makes
8 sense, and it dovetails with the policy concerns that your
9 Honor is going to have to apply in this case, the very
10 serious policy concerns that have to do with not extending
11 U.S. law and not making the United States the policemen of
12 the entire world, because the Supreme Court said that we are
13 not. And I think your Honor is going -- I am sure you will
14 very carefully analyze the issue as to whether or not what
15 the government is asking isn't, as we say, asking you, your
16 Honor, to go well beyond the law.

17 Finally, in due process, I don't have -- the due
18 process analysis necessarily sort of repeats a great deal of
19 the analysis that applies to the other categories, because we
20 are just discussing what contexts occur with United States.

21 But just one point. The government -- without
22 mentioning a case, the government just says, well, United
23 States Supreme Court just generally -- I don't know which
24 case they mean -- they say the United States Supreme Court
25 made a decision that aliens don't have due process rights.

1 So, your Honor, when we -- as you are looking at
2 this -- it's at Page 37 in the defense reply in Footnote 25.
3 I mean, there is two cases that I think that the government
4 could be referring to.

5 One is a case in which a resident alien was ordered
6 removed from the United States and held at an INS detention
7 facility, and they were trying to figure out, did that person
8 have rights? But that person didn't even have a case in the
9 United States.

10 And the other is even more unusual, this *Johnson v.*
11 *Eisentrager*. There, it was an alien who -- the alien, who
12 they found had no due process rights, was actually a German
13 individual who was found to be a national enemy to the United
14 States after World War II. And in military proceedings, this
15 person was asking to have due process rights. And one of the
16 bases -- the court said, well, we can't give you due process
17 rights, because U.S. soldiers, who subject themselves to the
18 military tribunal, they don't have due process rights. So it
19 would be very unjust to give this German alien, who was
20 basically engaging in warfare against the U.S. after the
21 treatise, more rights than U.S. soldiers.

22 So these are unusual cases. They don't stand for
23 the principle that these foreign defendants don't have due
24 process rights.

25 If we have any question about that, you can look no

1 farther than the *Hijazi* case, because in *Hijazi* the Seventh
2 Circuit had no problem analyzing that those defendants had --
3 that that defendant had a due process right. That defendant
4 was a foreign national, who was outside the U.S., and indeed
5 he wasn't alleging all these other things that we are talking
6 about, about RICO and extraterritorial jurisdiction. He was
7 really simply charging that what had happened was a violation
8 of his due process rights.

9 He, by the way -- and, yes, the government was
10 accurate. I'm sorry that I didn't have the answer for your
11 Honor the other day. Eventually there was found to be
12 jurisdiction, but the defendant in *Hijazi*, he actually
13 engaged in a fraud scheme in which the United States
14 Government was overbilled by \$3.5 million because of his
15 fraud scheme, directly out of the coffers of the
16 U.S. government, in connection with supplying tanks in the
17 war effort in Kuwait.

18 So I think the Seventh Circuit case *Hijazi*, in
19 analyzing due process, what the court asked was, how much is
20 enough? How much is enough in terms of the defendant's
21 connection with the United States?

22 And I think that this is a formulation not just for
23 due process, your Honor, but a formulation for all of the
24 determinations that your Honor has to make involving the
25 arguments that we have made on Monday, today, and in our

1 briefs.

2 And we would submit to your Honor that when the
3 focus of an indictment is a bribery scheme of Indian
4 officials in India in connection with a mining project in
5 India, the answer to that question is that incidental travel,
6 meetings, phone, and even meetings with some company that
7 might have bought something but didn't have to are not
8 critical to the offense charged in the indictment. And the
9 answer is that, under the law of the Seventh Circuit and the
10 Supreme Court, it's not enough.

11 THE COURT: Thank you.

12 Mr. Bhachu?

13 MR. BHACHU: Judge, is it all right for me to
14 proceed now?

15 THE COURT: Sure.

16 MR. BHACHU: Okay. Thank you, Judge.

17 Your Honor, maybe just starting with ripeness first
18 of all.

19 There was some discussion about how it was the
20 sensibility, at least for some attorneys in Austria, that
21 perhaps the Spanish appeal would be resolved in two to four
22 months from now.

23 The one thing I would say in that regard is, we
24 filed our appeal from the initial decision in 2015, and it
25 was decided at the outset of 2017.

1 THE COURT: Right.

2 MR. BHACHU: Now, the one kind of kernel, I guess,
3 there in relation to our case is that I believe perhaps after
4 that appeal was filed on our behalf by the Austrian
5 government, Mr. Firtash then appealed to the Austrian
6 Constitutional Court and argued that the extradition treaty
7 between the United States and Austria had unconstitutional
8 provisions in it that were unconstitutional under Austrian
9 law.

10 That separate appeal took precedence over the
11 extradition appeal in our case.

12 THE COURT: Over your appeal.

13 MR. BHACHU: Correct. Correct.

14 So there was -- that all goes to show that when one
15 tries to make a prediction about how quickly something is
16 going to happen in Austria, it may not actually turn out that
17 way.

18 With regard to the Spanish appeal, what I would
19 note is, there is a lot of ifs in Mr. Webb's view.

20 First of all, we have to decide whether or not --
21 not we. The Austrian courts have to decide whether or not
22 they are going to grant extradition to Spain and overturn
23 that lower court decision. If that happens, then it's going
24 to be up to the Minister of Justice, as we point out, to
25 decide which extradition proceeding will be given precedence,

1 the Spanish one or the American one.

2 And of course, there is still the pending
3 proceeding in the Supreme Court. If the Supreme Court
4 requests briefing on that issue, that obviously will
5 complicate things. And I can't imagine that there would be
6 any decision at all until both of those proceedings are at
7 their conclusion.

8 So obviously nothing is happening imminently, as
9 was suggested. I understand counsel, at the time, did not
10 know about the perfection of that appeal in Austria. Our
11 point would still kind of hold, Judge.

12 To address one of your comments, we do have a
13 concern about having a ruling here, because it just adds an
14 additional element of uncertainty to what's going on in
15 Austria.

16 In one case, if it's adverse to the defendant, then
17 I think there is, respectfully, still a fair chance that, if
18 he thinks all his options are exhausted, that at that point
19 he will decide to forego a \$174 million bond rather than come
20 to the United States.

21 But the other issue is confusion, in the sense of,
22 if there are pending proceedings in Austria, if there is an
23 adverse ruling in this court, then that may not be the final
24 word. And yet the Austrian courts will then wonder what's
25 going on. What do we do in light of that ruling, et cetera?

1 I mean, there is mention, just as an example, to
2 the *Hoskins* case, obviously. That's a case that is on appeal
3 in the Second Circuit. There could be additional proceedings
4 here.

5 That just kind of confuses the matter further when
6 we have got an appeal in one court relating to Spain. We
7 have a proceeding before the Austrian Supreme Court.

8 What's not mentioned is that counsel in Austria for
9 Mr. Firtash has also assured that they will appeal to the
10 European Court of Human Rights. That will take additional
11 time.

12 What I also understand in situations like that is,
13 it's not uncommon for a defendant, like Mr. Firtash, to ask
14 the European Court of Human Rights to issue a request -- or a
15 directive to a state to take provisional measures to prevent
16 extradition. I don't pretend to understand the complexities
17 of that situation.

18 But I do know also, from what I have been told,
19 that Mr. Firtash has asked that Mr. Firtash not be extradited
20 before at least the proceedings in the Austrian Supreme Court
21 are done.

22 So all of that is to say that there is a lot of
23 uncertainty here, and I think that a decision in this court
24 might just breed additional uncertainty, if it's made before
25 Mr. Firtash returns.

1 Moving to the issues that were talked about with
2 regard to venue.

3 What I would like to point out -- and I actually
4 have two cases, also, I think that are additional authority
5 to respond to this argument that's been made by Mr. Firtash.

6 The first thing that was raised today was -- or one
7 of the things that was raised was this citation to the *Bohle*
8 case.

9 Let me just talk briefly about that *Bohle* case so
10 that your Honor knows what that case was about. I went back
11 and looked at it after it was mentioned as being on point in
12 this case.

13 The *Bohle* case was a case of aircraft piracy where,
14 as I understand it, the defendant actually boarded a plane in
15 Florida -- or last was in the United States, I believe in
16 Florida, and engaged in aircraft piracy.

17 When he was returned, I think, by Canadian law
18 enforcement officials, his port of entry into the United
19 States was New York.

20 He was indicted in Indiana. The allegation in the
21 indictment that related -- well, the only allegation in the
22 indictment that related to Indiana was the fact that he was a
23 resident of Indiana, not that he had committed the crime in
24 Indiana.

25 That was the issue that really was confronting the

1 court. In terms of an allegation of the commission of the
2 crime, there is a jurisdictional or a venue provision that
3 permits, in certain cases, where an offense is committed
4 outside of any district, that the district where the
5 defendant is first returned may suffice to satisfy the venue
6 statute.

7 So what we have here is something very different.
8 We actually allege in our indictment that the crime was
9 committed in the Northern District of Illinois and elsewhere.

10 In that regard, I point the Court's attention to
11 *United States v. Lawrence*, 543 Federal Appendix 564. And it
12 cites in that case *United States v. Knox*, 540 F.3d 708, and
13 it's a pinpoint cite to 713, 714.

14 In *United States v. Lawrence* the defendant
15 challenged venue here. And it says, "Lawrence apparently
16 believes the indictment fails to allege venue over either
17 crime and that, consequently, he is actually innocent."

18 And then the court says, "Both counts of conviction
19 allege, however, that the crime was committed in the Northern
20 District of Illinois and elsewhere, and that allegation is
21 adequate to allege venue."

22 So we have -- and they cite the *United States v.*
23 *Knox* case, which has a similar sort of discussion.
24 Principles are slightly different in that case. In one count
25 of the indictment, it was a count where the allegation said

1 the crime occurred in the Ivory Coast, or Côte d'Ivoire, I
2 think, is maybe how it was referred to in the case, which is
3 in Africa. That was a false statement case. There actually
4 is a basis to allege venue in that situation, which we won't
5 get into.

6 But the other count alleged that the crime occurred
7 both in this district and another district. I think it said
8 in the Eastern District of Missouri and the Northern District
9 of Illinois.

10 And then the court says, "Therefore, unlike
11 Count III that only mentioned Côte d'Ivoire, we can't say
12 that any potential venue defect presented itself on the face
13 of the indictment."

14 So under those cases, as well as the *Engle* case,
15 which is cited by the Seventh Circuit as well -- that's a
16 Fourth Circuit case -- it's clear that all we have to do in
17 an indictment is allege that venue -- that the crime occurred
18 in this district, as we have done, and elsewhere as to each
19 count, and that is satisfactory under guiding Seventh Circuit
20 precedent to establish venue.

21 There was obviously some talk about my discussion
22 about certain pieces of evidence, but I think that's only to
23 show that -- here is the thing.

24 We allege, as we are required to, in the indictment
25 that the crime occurred in the Northern District of Illinois.

1 We do allege that acts were taken in this district as well.
2 We are not required to set out in chapter and verse in an
3 indictment what actually happened in this district. That's
4 exactly what the Seventh Circuit has said on multiple
5 occasions.

6 So there is not a different rule in this case
7 because of the parties involved or the profile of the case or
8 anything like that. It's the same rule that applies in all
9 other cases, and that's what the Seventh Circuit said.

10 We also pointed out, as we did before, about 3237,
11 which talks about the fact that if there is travel from a
12 district, that's a substantial -- that's a basis upon which
13 to establish venue as well.

14 With regard to the effects that were discussed,
15 again, we are not required to plead effect in the district.
16 What we are able to do is bring a case in a district where
17 the proof will show an effect on commerce would have
18 occurred.

19 The Hobbs Act cases talk about effect on commerce
20 being an element of the offense. An effect on commerce is an
21 element of the racketeering offense as well.

22 So, so long as we are able to prove at trial that
23 there was an effect on commerce in this district or would
24 have been an effect on commerce in this district, we satisfy
25 our element of proof.

1 Of course, the idea that Company A -- the effort to
2 have Company A engage in a contract where they would receive
3 a massive amount of goods in a project that was slated to
4 generate \$500 million in revenue yearly, the notion that
5 there is no effect on commerce in this district, where
6 Company A is based in this district -- you fairly read the
7 allegations about Company A being based in this district and
8 entering into a contract, those are the types of things that
9 you talk about as having effect in this district.

10 Of course, we are not restricted to our proof in
11 the indictment as to what other effects on commerce might
12 have been had, for example, to the extent we have employees
13 or representatives of Company A taking acts either in this
14 district or elsewhere, or traveling elsewhere to do so in aid
15 of the charge.

16 With regard to another point that was made, and
17 touched on, again, about these guys haven't been here,
18 et cetera, we have cases that we cite in our brief, Judge,
19 that specify for basically the better part of 200 years that
20 there is no requirement under the law that you actually set
21 foot in a district in order for venue to be proper there.

22 There is the *Hyde* case from the Supreme Court --
23 these are all laid out in some detail -- as well as another
24 case more recent that discusses this notion that there is
25 basically no proof -- or no requirement whatsoever that a

1 particular defendant set forth -- or stepped foot in a
2 district in order for venue to be proper as to that defendant
3 where a conspiracy is charged. I just point the Court to
4 those cases.

5 With regard to the arguments that Ms. Gurland
6 addressed, in terms of the arguments that related to
7 extraterritoriality, Ms. Gurland advertised *RJR Nabisco* as a
8 game changer, if you will. I would point out that the result
9 that was had in the Supreme Court was a result that was the
10 one sought by the United States because it filed a brief in
11 that case. So it wasn't some sort of game changer that was
12 adverse to the United States. It's the result we actually
13 asked for and received.

14 Foreign enterprises are covered in that case. So I
15 just want to make it clear that -- what was really happening
16 there.

17 I think that the other thing is that this notion of
18 we haven't gone through any extraterritorial jurisdiction
19 analysis, we filed a 100-page brief. I'll let your Honor
20 decide whether or not we managed to do that.

21 I do think that what is clear here is that we
22 alleged the last two applications of the Travel Act on the
23 face of the indictment. If we are sticking to the
24 indictment, as has been asked, then there is no basis to
25 think that we haven't alleged domestic applications of both

1 statutes, both in terms of the Travel Act, because we simply
2 say somebody traveled from Point A to Point B in the United
3 States and then took an act in furtherance. I can't imagine
4 how you could read that as being an extraterritorial
5 application of the statute.

6 And then with respect to Section 1956, we actually
7 talk again and again about money coming into the United
8 States, money going out of the United States.

9 There was also a reference to the *Bank Julius* case
10 and some notion that it didn't support our position. I
11 invite the Court to read that case. I actually, in the
12 miracles of modern technology, pulled it up on my telephone
13 here. We are not allowed to use a Westlaw application on our
14 government phones, I am happy to say.

15 So it says here that claimants maintain -- I am
16 reading from the case itself.

17 "Claimants maintain that because United States
18 institutions necessarily must be used to convert foreign
19 currency into United States currency, the money had to go
20 through a bank in the United States; but, according to the
21 claimants, such a transfer through U.S. banks is an
22 insufficient basis to provide jurisdiction in this court.

23 "It follows, they say, that the United States
24 cannot bring actions against any criminal proceeds that are
25 thus converted. In fact, the converse is true.

1 "If, as claimants assert, United States currency
2 has been the bedrock of international trading and commerce,
3 then Congress was justified in attempting to oversee the use
4 of United States financial institutions and in seeking to
5 prevent their use as a clearinghouse for criminals.

6 "At oral argument, claimants suggested that such an
7 assertion would make the United States the policeman of the
8 world," which, as I take an aside, that was made an at
9 argument here today.

10 What the judge said -- I think it was Judge
11 Friedman from the District of Columbia -- said, "In fact, it
12 only makes the United States government the police of
13 criminal conduct that takes place, at least in part, in this
14 country."

15 So I think that case entirely refutes the argument
16 that's made by the defendants in regard to the application of
17 the money laundering statute, and I think they have sorely
18 misread that case.

19 I think we have also talked about before -- I am
20 not going to talk about again -- the fact that the
21 transactions do take place, in part, in the United States.
22 That's what the allegations is in the indictment. If we are
23 not going to behind the indictment, as is suggested, then
24 there is no reason to think that we haven't properly alleged
25 a crime that takes place, in part, in the United States.

1 Therefore, however the crime is characterized, is within the
2 bounds that the Supreme Court -- the United States Supreme
3 Court has set.

4 With regard to the due process rights argument, I
5 don't think there is much I really need to add there. The
6 claim that this crime was incidental and the activity was
7 incidental, again, is really an argument that's best
8 presented at trial.

9 The fact of the matter is -- and I was talking
10 about some of the evidence in this case that might come out
11 at trial. Obviously, Ms. Gurland and Mr. Webb and their
12 colleagues, they don't have the benefit of any of the
13 evidence that we have really kind of assembled in this case.
14 They, of course, I am sure, have read a couple of affidavits
15 that were submitted in the Austrian court proceedings. But
16 we have tens of thousands of pages of discovery in this case.
17 We have thousands of interceptions in this case. Of course,
18 we are not going to play them all.

19 But they certainly don't have a full grasp of
20 everything that was going on here in the United States. Nor
21 have we had an opportunity to fully set that out, because an
22 indictment is really not the place to do that in a situation
23 like this.

24 We have made the allegations that we need to with
25 regard to our case, and we have properly alleged crimes that

1 are both properly set forth or brought in this district that
2 are not extraterritorial in application.

3 There were some arguments made with regard to the
4 FCPA. If your Honor wishes to hear anything or has a
5 question about that, my colleague from the fraud section,
6 Mr. Cestaro, is on the phone and would be happy to address
7 any issues your Honor may have there.

8 Otherwise, we would ask for the Court, as we said
9 before, to defer ruling in light of the fact that the
10 Austrian proceedings are still ongoing and, in the
11 alternative, to deny the motion to dismiss.

12 THE COURT: Well, what --

13 MR. KAHN (telephonically): Good -- sorry. Go
14 ahead.

15 THE COURT: Go ahead.

16 MR. KAHN: I apologize, your Honor. This is
17 actually Daniel Khan. Mr. Cestaro didn't introduce me,
18 because I wasn't in the room when he introduced himself. We
19 didn't want to interrupt again.

20 If it's okay, I would just address a couple of the
21 points that defense counsel raised.

22 THE COURT: Okay.

23 MR. KAHN: So, first of all, thank you for letting
24 us appear telephonically. We certainly appreciate that.

25 I will be very brief here, your Honor. Just a few

1 points, taking the arguments in order.

2 Defense counsel made the point that foreigners who
3 act abroad and never step foot in the United States are not
4 covered by the FCPA. That's simply incorrect.

5 The FCPA covers domestic concerns, as well as
6 officers, employees, and agents of domestic concerns, as well
7 as issuers, U.S. issuers, so foreign companies that issue
8 stock on the U.S. exchange and employees and agents of those
9 issuers.

10 So there is no question -- and even the *Hoskins*
11 court and no court has ever held that a foreign national
12 agent who never steps foot in the United States couldn't be
13 covered under the FCPA. It's very clear, your Honor, that a
14 foreign national agent who never steps foot in the United
15 States could be prosecuted and convicted under the FCPA, and,
16 in fact, it has happened before.

17 So the difference here is the difference between a
18 foreign national agent and a foreign national nonagent. That
19 difference does come down to the element of control. Is the
20 foreign national individual covered by -- controlled by the
21 domestic concern?

22 So despite the fact that defense counsel said that
23 this doesn't come down to whether or not they were too
24 high-level, that is, in fact, the very issue that this comes
25 down to.

1 So again, the fact that the defendants here weren't
2 low-level enough to be controlled by the domestic concern
3 such that they would be considered agents of the domestic
4 concern, that is the issue. And that's the issue at hand
5 here.

6 So it's not really an issue of extraterritoriality.
7 Defense counsel raised the point that extraterritoriality
8 demands that we read and construe the FCPA in a way such that
9 he can never be prosecuted. That's, again, a misreading of
10 extraterritoriality and the argument at issue here.

11 A foreign national agent who never steps foot in
12 the United States could be covered. So if the defendant were
13 lower-level and engaged in the exact same conduct, we could
14 unquestionably cover him under the direct prohibitions of the
15 FCPA.

16 So the argument boils down to not a matter of
17 geographical scope, but rather the status and stature of the
18 defendant. And that's very clearly a question of *Gebardi*.
19 It's not a question of extraterritoriality.

20 Staying on extraterritoriality for a minute, there
21 is also no question that the Foreign Corrupt Practices Act,
22 which prescribes conduct relating to the payment of bribes to
23 foreign officials to secure business in that foreign country,
24 applies extraterritorially.

25 So again, we take the position that this is not an

1 extraterritoriality issue. But if your Court were to go down
2 that road, we think that there is no question that the FCPA
3 does apply extraterritorially.

4 And also very clearly in this case, there is a
5 domestic application of the statute. As has just been
6 pointed out, there is 200 years of case law that makes clear
7 that where we are talking about a conspiracy, where acts take
8 place in the United States, a defendant, a foreign national
9 defendant doesn't need to come into the United States and
10 take part in the United States. They are guilty if there are
11 overt acts and acts in the United States in furtherance of
12 the conspiracy. And that is what we have here.

13 The last point I will make is, with respect to
14 *Pino-Perez*, *Pino-Perez*, your Honor, rejected the exact
15 argument that defense counsel is making here.

16 In *Amen*, the Second Circuit case, did not. That is
17 the case that the *Hoskins* court relied on. So *Pino-Perez*, I
18 think, is directly applicable here.

19 And the analysis that defense counsel said that the
20 necessary party rule would apply here because the defendant
21 was necessary to this bribe scheme, that misses the point,
22 your Honor.

23 The necessary party argument that was espoused in
24 *Gebardi v. United States* and then again laid out and argued
25 in *Pino-Perez* and rejected was not whether the particular

1 defendant was necessary to the specific statute charged or
2 the specific violations charged in any particular case. The
3 question is whether that class of defendant is a necessary
4 party to every single violation of that law.

5 So in *Gebardi*, they were talking about the Mann
6 Act. And under the Mann Act, it was a man transporting a
7 woman at that point in time.

8 So there was no question that in order to violate
9 the Mann Act, there had to be the transportation of a woman
10 in every single violation. And the fact that Congress
11 clearly understood that, they must have been thinking about
12 that woman when they came up with the Mann Act, because the
13 exact conduct that they are prescribing is the transportation
14 of that woman.

15 And the fact that they decided not to allow
16 prosecution of that woman through the substantive statute
17 meant that they did not intend to have anyone get around that
18 through conspiracy.

19 And that was the exact analysis that the Fifth
20 Circuit undertook in *United States v. Castle* under the FCPA.
21 There are bribe payers and there are bribe recipients. And
22 clearly both sides, bribe payers and bribe recipients, are
23 necessary to every FCPA violation. And yet Congress chose to
24 specifically prohibit the bribe-paying side but not the
25 bribe-recipient side.

1 Here the defendant's argument is that he is a
2 foreign national nonagent. There is no indication in the
3 statute and there is no indication in the legislative history
4 that Congress was thinking of a foreign national nonagent.
5 There is certainly no suggestion that a foreign national
6 nonagent is necessary to every FCPA violation.

7 The fact that he is higher level than an agent
8 would be, there is no indication in legislative history that
9 that is what Congress was thinking of or trying to immunize
10 such a person.

11 To the contrary, in legislative history, Congress
12 was concerned about scapegoating people and, in fact,
13 expressed a concern that by allowing the prosecution of
14 agents, that perhaps they would be used as scapegoats. They
15 did not want that to happen.

16 So, if anything, your Honor, there is indication in
17 the legislative history that the defendant is the exact type
18 of person that Congress would want to be allowed to have
19 prosecuted.

20 Unless your Honor has any other questions, we don't
21 need to make any further comments on defense counsel's
22 argument on the FCPA.

23 MR. BHACHU: The only thing I would add, Judge, is
24 that Mr. Robell wished to be present, but he actually had a
25 conflict with getting on an international flight, and

1 Mr. Kahn and his colleague kindly stepped in for him.

2 THE COURT: No problem.

3 Thank you very much.

4 MR. WEBB: Your Honor, could I just ask one
5 question very briefly?

6 Thank you for hearing us.

7 They cited two cases that we didn't have notice of.

8 I am not -- can I just ask leave that if I -- I am going to
9 review the cases. I don't think they overruled *Bohle*, but I
10 want to look at them.

11 Can I have leave, within five days, to file a brief
12 that's under five pages, if I feel it's necessary?

13 THE COURT: That's fine.

14 I think what Mr. Bhachu said is that *Bohle* relied
15 on two other cases. I'm not sure. He is talking about two
16 cases that relate to *Bohle*. That would be fine.

17 Folks, I am so overdue. I have to get out of here.

18 MR. WEBB: Thank you very much.

19 MR. BHACHU: And may we also file something as
20 well?

21 THE COURT: Sure.

22 MR. BHACHU: Thank you, Judge.

23 MR. KAHN: Thank you, your Honor.

24 (An adjournment was taken at 11:50 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward September 18, 2017.
Official Court Reporter
F/j